IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

SECOND APPEAL NO. 1187 OF 2004.

Rajnikant Walchand Gandhi,
Age: 70 years, Occ.: Trading,
R/o. 17, Raviwas Peth, Karad
District: Satara. .... Appellant.

Versus.

1. Mophan Walchand Gandhi,
(since deceased through HLRs)
1A) Smt.Mira Mohan Gandhi.
1B) Kum.Gita Mohan Gandhi.
1C) Kum.Sima Mohan Gandhi.
1D) Kum.Priti Mohan Gandhi.
1E) Kum.Priyanka Mohan Gandhi.
Respondents Nos.1A to 1D are Major and No.1E being minor through Respondent no.1A, all residing at 17, Raviwar Peth, Kara, Dist. Satara. .... Respondents.

Shri Uday Warunjikar for the Appellant.

Shri S.G.Deshmukh for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 8th April, 2005.

ORAL JUDGMENT.

1. Heard Shri Warunjikar for the Appellant and Shri Deshmukh for the Respondents. The following substantial question of law arises in the Second Appeal:

(i) Whether the First Appellate Court has failed to perform his duty as a final fact

finding Court and whether as a result of the failure prejudice has been caused to the Appellant?

The Second Appeal is admitted on the aforesaid substantial question of law. Considering the facts and circumstances of the case the Appeal is forthwith taken up for final disposal.

2. The Second Appeal is preferred by the original Plaintiff. The Appellant/Plaintiff filed a suit for partition and separate possession claiming 1/2th share in the suit properties. The learned trial Judge partly decreed the suit. An Appeal was preferred by the Appellant herein before the District Court. The said Appeal has been dismissed by the Appellate Court.

3. The case of the Appellant/Plaintiff is that the Appellant and the original Defendant No.1 are real brothers. The father of the Appellant died on 9th October 1969 and the mother died on 29th May 1985. The case made out by the Appellant/Plaintiff is that his father was holding properties described in paragraph 1A and 1B of the plaint which were his self acquired properties. It is alleged in the plaint that the father was holding certain other moveable properties. The

Appellant/Plaintiff relied upon an alleged will dated 21st September 1967 executed by his deceased father.

4. The original Defendant No.1 contested the suit by filing Written Statement. He denied the execution of the will of the father set up by the Appellant/Plaintiff. He relied upon the will dated 6th May 1985 executed by the mother Kamalabai.

5. The trial Court held that the Appellant/Plaintiff has failed to establish the execution of the will and in fact it was held that the alleged will dated 21st September 1967 is false and forged. The trial Court held that the original Defendant has acquired 6/7th share in the undivided immoveable properties. The Appellate Court has confirmed the said findings.

6. Shri Warunjikar appearing for the Appellant has made detailed submissions. The first submission made by Shri Warunjikar is that the Appellate Court has failed to perform its duty by not considering the evidence on record independently and by recording independent findings. He submitted that the reasoning given by the Appellate Court and the trial Court is almost identical. He invited my attention to various paragraphs in the Judgments of the Courts below and pointed out that the

said paragraphs are word to word same.

7. Shri Deshmukh appearing for the Respondents submitted that the Appellate Court has confirmed the Judgment and Decree of the trial Court and therefore, while confirming the Judgment and Decree, the Appellate Court was not expected to give detailed reasons and it was sufficient if the Appellate Court expressed its general agreement with the findings recorded by the trial Court. He submitted that though some of the paragraphs in the Judgments of the Courts below may be identical still the Appellate Court has considered the evidence on record and confirmed the findings of fact recorded by the trial Court. He submitted that there are concurrent findings of fact by the Courts below. He invited my attention to the oral evidence and submitted that no other conclusion was possible on the basis of the evidence on record.

8. I have considered the rival submissions. The Judgments of the Courts below make an interesting reading. If paragraph 28 of the Judgment of the Appellate Court is compared with paragraph 25 of the Judgment of the trial Court, I find that except few sentences, paragraph 25 of the Judgment of the trial Court and the paragraph No.28 of the Judgment of the

Appellate Court are word to word identical. Same is the case in respect of paragraph 29 of the Appellate Court Judgment and paragraph 28 of the trial Court Judgment. After paragraph 30 of the Judgment of the Appellate Court is compared with paragraph 26 of the trial Court Judgment, surprisingly both are found to be almost same. Comparison of paragraph 27 of the Judgment of the trial Court with paragraph 31 of the Appellate Court shows that there is only a minor variation. Paragraph 32 of the Judgment of the Appellate Court is identical with the paragraph 27 (trial Court has wrongly given paragraph No.27 to two consecutive paragraphs) of the trial Court Judgment. The reasoning part of the Judgment of the Appellate Court starts with paragraph 15. Paragraphs 15 and 16 contain the preliminary discussion and in paragraph 17 to paragraph 27 the learned Appellate Judge has discussed various precedents relied upon by the Counsel appearing for the parties. Further discussion and findings on the merits of the case are recorded from paragraph 28 to 37. A comparison of certain paragraphs of the Judgments of the Courts below referred to by me in earlier part of this Judgment only by way of illustration. A perusal of the said paragraphs shows that substantial part of the Judgment of the trial Court has been word to word incorporated in the Appellate Court Judgment.

9. The submission made by Shri Deshmukh that while confirming the Judgment and Decree of the trial Court, the Appellate Court is not expected to record detailed reasons cannot be disputed. However, the duty of the first Appellate Court while dealing with the appeal under section 96 of the Code of Civil Procedure, 1908 cannot be overlooked. The law on this point is no longer res integra. In a decision of the Apex Court reported in (2000) 5 S.C.C. page 652 (State of Rajasthan v/s. Harphool Singh) it was held that it is the duty of the Appellate Court to apply its mind to the evidence on record. The Appellate Court is under an obligation to make critical analysis of the evidence on record and the pleadings of the parties. It is expected of the Appellate Court that an objective consideration of the material on record should be made. The Apex Court in the said decision deprecated the practice of mechanically affirming the findings of the trial Court by merely reproducing the same. A reference will have to be made to an another decision of the Apex Court reported in AIR 1963 SC page 146 (Thakur Sukhpal Singh v/s. Thakur Kalyan Singh & another). The Apex Court has an occasion to consider the power of the Appellate Court. The Apex Court in paragraphs 10 and 11 of the said Judgment has held thus:

"10. The view that we take also finds support from the object which the Legislature probably had in providing that the judgment must contain the matters mentioned in R.31. The object seems to be that the parties should know for what reasons the decision has gone against them and thereby be in a position to decide whether they should go up in appeal or revision against the judgment. If they do not know the decision and the reasons therefor, they cannot make up their mind and even if they have no intention to go up in appeal, they may not even be satisfied about the Court considering the matter for determination properly.

11. Another object can be that the second appellate Court or the revision Court be in a position to know why the Court below came to a certain conclusion. Such knowledge is undoubtedly of great assistance to the Court. If therefore, no contention is raised by the appellant in the first appellate Court, no question of raising any contention in the next appellate Court arises and therefore, the

necessity of writing a complete judgment contemplated by R.31 does not arise."

11. In yet another decision reported in (2001) 4 S.C.C. page 756 (Madhukar and others v/s. Sangram and others), the Apex Court held that the first appeal is a valuable right of the parties and the parties have orally to be heard both on the question of law and on facts and the Judgment in the first Appeal must address itself on all the issues of law and facts and decide it by giving reasons in support of the findings. Another well settled principle is reproduced by the Apex Court in a decision reported in (2001) 3 S.C.C. 179 (Santosh Hazari v/s. Purushottam Tiwari) and the Apex Court reiterated that in a first Appeal unless rights of the parties are restricted by law, the whole case is therein open for rehearing both on questions of fact and law.

The Apex Court held:

"The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First Appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. **The judgment of the appellate court must, therefore, reflect**

its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court."

12. Considering the nature of the duty of the first Appellate Court it was necessary that the Appellate Court should have applied its mind to the pleadings and evidence on record independently and ought to have come to an independent conclusion. The manner in which the Judgment is delivered by the first Appellate Court clearly shows that there was no independent application of mind by the Appellate Court. What has been done by the Appellate Court is only a mechanical reproduction of the findings recorded by the trial Court. This is not a case where any independent reasons are assigned by the Appellate Court. The very fact that the reasons recorded by the Appellate Court are borrowed word to word from the Judgment of the trial Court indicates a complete non-application of mind by the Appellate Court. The Judgment does not disclose conscious application of mind. This is a case where the first Appellate Court has not discharged its duty as a Court of first Appeal. As there is a clear failure on the part of the first Appellate Court to discharge its statutory duty,

interference is called for in the Second Appeal only on that ground. As there was no conscious application of mind by the First Appellate Court, obviously a prejudice has been caused to the Appellant. The Apex Court in a decision reported in (2002) 7 S.C.C. page 441 (Rattan Dev v/s. Pasam Devi) has held that non-application of mind by the first Appellate Court and consequent failure of the Appellate Court to discharge its obligation raises a substantial question of law.

13. Considering what is stated above, the result is inevitable and an order of remand will have to be passed. At this stage Shri Deshmukh appearing for the Respondents brought to my notice that initially the Appellant filed an Appeal against the decree of the trial Court in this Court which was numbered as First Appeal No.185 of 1997. After the amendment to the Bombay Civil Courts Act, 1869, the Appeal was transferred to the District Court. He pointed out that during the pendency of the First Appeal No.185 of 1997 certain interim order was passed by this Court by order dated 16th March 1999 in Civil Application No.9156 of 1998. He pointed out that the said order continued to operate till disposal of the Appeal in the District Court. He pointed out that as per the said order the Appellant is liable to pay 1/2 of the electricity

charges, 1/2 of the water charges and 1/2 of the Municipal House Tax. He submitted that the Appellant is in arrears to the tune of Rs.14,288/-. He therefore submitted that appropriate direction needs to be issued while remanding the matter.

14. In view of the above, the following order is passed:

(i) The impugned Judgment and Decree passed by the first Appellate Court is quashed and set aside. Regular Civil Appeal no.42 of 2001 is restored to file.

(ii) The parties will appear before the learned Additional District Judge, Karad, on 13th June 2005 at 11.00 a.m. for fixing a date of hearing of the Appeal.

(iii) It is made clear that the order dated 16th March 1999 passed in Civil Application No.9156 of 1996 in First Appeal No.185 of 1997 will continue to operate till final disposal of the Appeal. If the Appellant is in arrears of electricity charges, water charges and the Municipal Tax

payable in terms of the said order, the Appellant will clear the same within a period of two weeks from today.

(iv) The Appellate Court will decide the Appeal afresh in the light of the observations made in this Judgment as expeditiously as possible and in any event on or before 31st August 2005.

(v) All questions on merit are kept open.

(vi) Parties to act on an authenticated copy of this order.

Judge.